In The

Supreme Court of the United States

October Term, 1977

No. 77-480

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America, hereby requests that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 30, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals was rendered orally on June 3, 1977. The decision and order of the National Labor Relations Board are reprinted in the Appendix annexed to this petition at page A 4, and reported at 225 NLRB No. 55.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1977 (Appendix A, p. 1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the finding of the National Labor Relations Board that Local 259 violated §8(b)(1)(B) of the Act by restraining and coercing an employer to discharge its representative for the adjustment of grievances unlawfully restricts the constitutional right of unions to express opinions that are non-coercive in nature?

STATUTES INVOLVED

Section 8(b)(1)(B) of the National Labor Relations Act [29 U.S.C. §158(b)(1)(B)] provides as follows:

> "Section 8(b): It shall be an unfair labor practice for a labor organization or its agents -

> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Section 8(c) [29 U.S.C. §158(c)] provides:

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

STATEMENT OF THE CASE

After an election conducted by the National Labor Relations Board (hereinafter "Board") on January 17, 1975*, Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America (hereinafter sometimes referred to as "Local 259" or "Union") was certified as the collective bargaining representative of the service department employees employed by Atherton Cadillac, Inc. (hereinafter sometimes referred to as "Employer" or "Company". (A. 5,31-33)** During the

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*All dates refer to 1975 unless otherwise indicated.

**This designation refers to the printed Appendix in the Court below.

campaign Anthony Dazzo, the Employer's Service Manager, engaged in anti-union activity at the behest of the Employer. He laid off several employees, announced that further layoffs would occur, and indicated that he intended to reduce an employee's wages (A. 5, 38, 98, 99, 144, 153, 156).

On January 20 Louis Salvatore, Local 259's business representative, and Steve Elliott, Union representative requested that Dazzo recall the laid off employees. When Dazzo refused Salvatore replied that "this [was] a declaration of war" (A. 5,6, 16,42). The next day Salvatore and Elliott met with the Employer's President Atherton, Sr. in a further attempt to have the employees recalled to work. Their quest again proved futile and Salvatore informed Atherton, Sr. that "Dazzo is creating trouble" (A. 6,44,45).

Several days later Robert McDonald, an employee, observed that potential customers were being turned away and were being told that the service department was "booked up" even though the employees were still on layoff status (A. 6,16,144-146). McDonald informed the other employees of his observations. The employees, on their own initiative, and without the knowledge of Local 259, engaged in a two hour work slowdown to protest the turning away of work which adversely affected their earnings (A. 6,16,46-49,146).

The following day, and prior to the commencement of negotiations on February 3, Richard Atherton, Jr., the Employer's Vice President attempted to discover the reasons for the slowdown. He asked McDonald and

Edward Zegilla, another employee, to identify the problem. McDonald replied that the "problem is Dazzo; lighten Dazzo up; he is harassing and threatening the men; . . . turning away work; and . . . the men [are] upset by the proposed layoff" (A. 6, 17,78,147,148,163,164). Atherton, Jr. then asked McDonald and Zegilla whether they had "any recommendations for a new service manager". They suggested Ernie Barter, a service writer, for the position (A. 6,7, 14,148,163,164).* No Union official was present during these discussions which were initiated by Atherton, Jr. (A. 56,163,164).

In the meantime on January 22, Elliott had met with the employees to formulate contract proposals. The employees included as one of their demands that all laid off and suspended employees be recalled (A. 45, 46,66).

On January 31 the employees voted to strike on March 1 if a contract was not agreed upon by that date (A. 47). The strike vote was unrelated to the work stoppage previously engaged in by the employees and was taken to conform with the International Union's Constitution (A. 49,50). The problem of work being turned away was not discussed during the strike vote (A. 50,51).

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* Barter informed the employees on February 19 that he had been offered the service manager's job (A. 56,57).

Negotiations commenced on February 3. The parties met approximately six times*, including March 3, on which date a contract was agreed upon (A. 7,17). During these meetings Local 259 never suggested, let alone threatened, that it was seeking to have Dazzo discharged. Neither did Local 259 ever condition any bargaining concession or the signing of a contract upon his discharge (A. 7,17,60,61,125,129,149).

The Union's demands remained basically the same until the last bargaining session.** The reason, as explained by Salvatore at either the February 11 or February 20 bargaining session, was that the Employer's "manager is making things tough, harassing the committee, this is why the men are not being flexible, and why they want the contract terms that have been proposed" (A. 8, 17,54,55). Zegilla testified that because of Dazzo's actions, the men wanted as much money as they possibly could obtain, because their income was being affected (A. 169).

At the bargaining session held on February 27, Local 259 indicated that there would be no change in its proposals at that time. The Employer's attorney, Lewis Stone adjourned the meeting for a half hour, stating he wanted to confer alone with

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* Negotiating sessions were held on February 3, 11, 20, 25, 27 and March 3.

** It is also a fact that the ultimate settlement did not depart, in large measure, from the Union's original proposals (A. 58-60).

Atherton, Sr. When bargaining resumed, Stone announced that Dazzo had been discharged "based on what [Atherton, Jr.] had found out through [his] investigations". He also stated that "we feel that this is the problem and we are going to get rid of the problem forever" (A. 8,9,17,18,71,130, 131,149,155,167,168). Salvatore replied that he was not there "to discuss . . . Dazzo's discharge, I'm here to discuss a contract and I want to discuss a contract, not . . . Dazzo's discharge, that is not my cup of tea" (A. 9,17,18,71,131,150,156).

That evening the Union officials met with the employees who had previously expressed their dissatisfaction with the slow progress of the negotiations and with conditions in the shop caused by Dazzo. When they heard that Dazzo had been discharged, they urged the Union negotiators to lower the demands and settle the contract as soon as possible (A. 9,18,71,72,131). There was never any discussion prior to the 27th that the demands would not be modified unless Dazzo was removed (A. 169).

At the next negotiating session the Union reduced its proposals somewhat and a contract was consummated (A. 10,58,59).

Dazzo testified that on February 11 he was told by Atherton, Sr., that "union agents . . . demanded that [he] be terminated; [that] they wouldn't negotiate a contract; [and that] if [he] wasn't off the premises that day they would strike" (A. 9, 18,104).* The General Counsel failed to

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* The actual date of Dazzo's discharge is in dispute. Dazzo claimed he was dis-

call Atherton, Sr. as a witness. Instead he offered a letter of reference purported to be signed by Atherton, Sr. which stated that "a union dispute arose and to avoid a strike, Mr. Dazzo became the focal point of the dispute that made it necessary to relieve Mr. Dazzo of his duties" (A. 9,18, 19,26).

THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ dismissed the complaint (A. 13). He noted that Dazzo's testimony was hearsay, and was thus of no probative value. The letter was also hearsay and could not be availed of to corroborate Dazzo's testimony. Atherton, Sr. could have corroborated the testimony but he was not called. Therefore, an inference should be drawn that had he testified, he would not have corroborated Dazzo, but would have instead given testimony favorable to the Union (A. 11).

In response to the argument of the General Counsel that the Union's modification of its bargaining proposals after Dazzo's discharge together with various

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charged on February 11. The Union asserted the discharge occurred on February 27. Neither the Administrative Law Judge ("ALJ") nor the Board resolved the dispute, although the former noted that "in view of the sequence of events it is more likely that Dazzo was dismissed on the latter (February 27), rather than the former date" (A. 7, fn. 15,4,181).

statements by agents of the Union led to an "inescapable inference" that the Union's bargaining position was adopted to cause the discharge, the ALJ decided that the "more likely inference" was that the Union's privileged hard bargaining was a response to the layoffs and expected cuts in salary. The ALJ concluded that the easing of the Union's bargaining position after the discharge created at best "a suspicion that it was the Union's purpose to cause (Dazzo's) discharge by refusing to do so earlier. But, as has been held countless times, suspicion is not a substitute for proof" (A. 12).

THE DECISION AND ORDER OF THE BOARD

The Board, without disturbing the ALJ's findings,* and in the absence of a single supporting citation, nevertheless reversed the ALJ and held that there was sufficient "circumstantial" evidence to establish a violation (A. 19-21). The Board's order required the Union to make Dazzo whole for any loss of earnings and to cease and desist from demanding of the Employer the discharge of Dazzo and from restraining and coercing the Employer or any other employer in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances (A. 23).

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* The Board did not agree that an adverse inference should be drawn because Atherton, Sr. was not called to testify as he was a witness equally available to both parties.

THE COURT OF APPEALS DECISION

The Board applied to the Court of Appeals for enforcement of its order. The Court, in an oral opinion enforced the order with the exception of striking from it any reference to "any other employer" as Local 259 was not found to have engaged in violations against any employer other than Atherton.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO PUBLIC POLICY AND PAST PRECEDENT IN THAT IT RESTRICTS THE CONSTITUTIONAL RIGHT OF UNIONS TO EXPRESS OPINIONS CONCERNING EMPLOYER REPRESENTATIVES IN THE ABSENCE OF THREATS AND COERCION AND FAILS TO MEET THE REQUIREMENTS OF THE SUBSTANTIAL EVIDENCE TEST.

a) Local 259 Did Not Restrain Or Coerce The Employer Within The Meaning Of The Act. Representatives Of Local 259 In Expressing Opinions Concerning The Employers's Representatives Were Engaging In Free Speech Guaranteed By The Constitution And §8(c) Of The Act.

When the Act was still in its embryonic stages, this Court held that employers had a constitutional right to express opinions that were noncoercive in nature. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469. In 1947 the Act was amended to specifically provide that the "expressing of any views,

argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or promise of benefit." 29 U.S.C. §158(c)

Both the Board and courts have been assiduous in protecting the free speech rights of employers. For example, one Court found that the following statement was not violative of the Act:

> "Our sincere belief is that if the Union were to get in here it would not work to your benefit but would in the long run itself operate to your serious harm. It is our intention to oppose the union and by every proper means to prevent it from coming into this operation." Clothing Workers (Hamburg Shirt Corp.) v. NLRB, 365 F. 2d 898 (CADC 1966). See also Wellington Mill Division v. NLRB, 330 F. 2d 579 (CA4 1964).

In Airporter Inn Hotel, 215 NLRB 156, the Board held that a statement in letter sent by an employer to employees during a union's organizational campaign to "refuse to sign any union authorization cards and avoid a lot of unnecessary turmoil" was not an "instruction or direction" but was protected by §8(C) as "views, argument or opinions" of the employer.

The same protection must be accorded to unions especially in view of the fact that employees are economically dependent on their employers and thus have a "tendency" to be more easily coerced than would those more "disinterested". NLRB v. Gissel

Packing Co., 395 U.S. 575. Unions do not possess any degree of control over employers, and thus noncoercive statements by unions can not form the basis for a finding of a violation of the Act.

Prior cases involving §8(b)(1)(B) took cognizance of this fact and found violations only where coercive conduct was involved. This Court in interpreting §8(b)(1)(A) held that:

> "Section 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof - conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." N.L.R.B. v. Drivers, Chauffeurs, Helpers Local Union No 1 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Curtis Bros., Inc.), 363 U.S. 274, 290.

Inasmuch as the "restrain and coerce" clause of Section 8(b)(1) applies to both Sections 8(b)(1)(A) and 8(b)(1)(B), the Board under Section 8(b)(1)(B), as under Section 8(b)(1)(A), is limited to authority to proceed against union tactics involving "violence, intimidation, and reprisal or threats thereof". There was no evidence that the Union engaged in any of these tactics as a means of coercing the Employer to discharge Dazzo.

The only direct testimony in the case, which was expressly credited by both the

ALJ and the Board, consisted of statements by all those present at the negotiations that the Union did not, during those sessions or at any other time, seek Dazzo's discharge. Nor did the Union ever condition the signing of a contract upon his discharge (A. 7,17,60,61,125,129,149). The Board's reliance on certain statements made to officials of the Employer, and the lowering of bargaining demands after Dazzo's discharge to support its finding that a violation occurred are not supported by substantial evidence.*

In prior cases in which a violation of §8(b)(1)(B) was found, there was compelling evidence that the union resorted to coercion by striking or picketing or threatening to take such action in order to dictate the Employer's choice of a grievance representative. See e.g. Local 423, Laborers' Int. Union of N. America (Mansfield Flooring Co.), 195 NLRB 241; Communication Workers of America, Local 2550, 195 NLRB 945; International Typographical Union, 86 NLRB 951; Los Angeles Cloak Joint Board, ILGWU (Helen Rose Co.), 127 NLRB 1543; N.L.R.B. v. Local 964, United Bro. of Carpenters, 447 F. 2d 643 (CA 2 1971). In this case there was simply no proof of any such threat. See Teamsters Local 427 (Edward D. Sultan Co.), 223 NLRB No. 202, 92 LRRM 1144.

Although there was no evidence that the Union even sought to persuade the Em-

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* This aspect of the case is discussed in detail, infra, p. 17 et seq.

ployer to discharge Dazzo, such a request would not constitute a violation of the Act. The Board in ILGWU (State Belt Apparel Contractors' Ass'n.), 122 NLRB 1390, 1391, enfm't. den. other grounds 274 F. 2d 376 (CA 3 1960) found that a violation had occurred because the unions:

> ". . . were not content merely to request or seek to persuade the employers to eliminate the selected representative, but refused to perform their statutory duty of representing the employees in the settlement of grievances and strikes. Thus, such a withdrawal from participating in negotiations of this nature 'was designed to exert some restraint or coercion . . . over and above a mere attempt at persuasion in a free market place of ideas. . . .'"

In Local 80, Sheet Metal Workers (Turner-Brooks, Inc.), 161 NLRB 229, 235, the Board held in a like manner, that insistence upon the inclusion of a non-mandatory subject of bargaining, while possibly a violation of §8(b)(3)(refusal to bargain), was not a violation of 8(b)(1)(B) because "mere insistence is not to be equated with the restraint or coercion required by the statute to establish an 8(b)(1)(B) violation." Cf. International Typographical Union Local 38 v. N.L.R.B., 278 F. 2d 6 (CA 1 1960), aff'd. by an equally divided court, 365 U.S. 705 (Union violates §8(b)(1)(B) by striking to force an employer to hire only union members as foremen) with Sakrete of Northern California, Inc. v. N.L.R.B., 332 F. 2d 909 (CA 9 1964), cert. den. 379 U.S. 961 (union can lawfully propose that supervisors be

covered by the collective bargaining agreement).

b) The Substantial Evidence Test

It is the hornbook law that suspicion is not a substitute for proof and may not serve as substantial evidence. Rafael Igartha, 174 NLRB 615, 619; N.L.R.B. v. Shen-Valley Meat Packers, Inc., 211 F. 2d 289 (CA 4 1954); N.L.R.B. v. Mears, 437 F. 2d 502 (CA 3 1970); N.L.R.B. v. Monroe Auto Equipment Co., 368 F. 2d 975 (CA 8 1966); Northern Petro-Chemical Co. v. N.L.R.B., 469 F. 2d 352 (CA 8 1972); Southwest Latex v. N.L.R.B., 426 F. 2d 50 (CA 5 1970). The Board, it is true, may rely on indirect or circumstantial evidence. However, such findings must themselves be supported by substantial evidence. Dubin-Haskell Lining Corp. v. N.L.R.B., 375 F. 2d 568, 573 (CA 4 1967).

While the courts have defined substantial evidence in various ways, the basic test is the same. Substantial evidence has been defined as "'evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred. . . .'" Dubin-Haskell Lining Corp. v. N.L.R.B., supra, at 573. This Court has stated that "[s]ubstantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229.

To satisfy the test the evidence "must do more than create a suspicion of the existence of the fact to be established

. . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury". N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300. See also N.L.R.B. v. Grease Co., 94 LRRM 3197 (CA 2 March 30, 1977). A motion for a directed verdict should be denied "if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions". Boeing Co. v. Shipman, 411 F. 2d 365, 374 (CA 5 1969). See also Magnat Corp. v. B. & B. Electroplating Co., 358 F. 2d 794, 797 (CA 1 1966); Business Development Corp. of North Carolina v. U.S., 428 F. 2d 417 (CA 4 1970); Fontanec Aviation, Inc. v. Beech Aircraft Corp., 432 F. 2d 1080, 1084 (CA 7 1970).

The evidence relied upon by the Board was not "of such quality and weight that reasonable" people "might reach different conclusions". The only conclusion that may reasonably be drawn from the evidence is that the Board did not establish that the Union violated Section 8(b)(1)(B). For the Court to enforce such an order violated its responsibility to search the record and to uphold the Board only when its findings are based on substantial evidence. The court abdicated its responsibility in this case when it permitted Board findings, based upon surmise and speculation, to stand.

c) The Inferences Drawn By The Board To Establish A Violation Were Not Based On Substantial Evidence.

While the Board may draw reasonable inferences from proven facts, these inferences to have conclusive effect must be drawn from the undisputed basic facts. Board of Publication of the Methodist Church v. N.L.R.B., 297 F. 2d 379 (CA 6 1962). The Second Circuit itself recently discussed the Board's Power to draw inferences:

> "In the fact finding process a trier is authorized to draw reasonable inferences from known or proven facts. But the inference, to qualify as a fact found, must be reasonable, and, in the context of the known facts, be one that springs readily and logically to mind and not one of two or more inferences, both or all of which are about equally probable." N.L.R.B. v. Martin A. Gleason, Inc., 534 F. 2d 466, 474 (CA 2 1976).

In this case the inference drawn by the Board was not itself equally probable with the one drawn by the ALJ who had dismissed the complaint. The Board could not credit the testimony of all of the witnesses for the Union, discount the hearsay evidence, and nevertheless, reach the conclusion that a violation of the Act had occurred. See Stemun Mfg. Co., 423 F. 2d 737 (CA 6 1970). The Court of Appeals in enforcing the Board's order, departed from its prior holding in the Gleason case, supra, and other Court of Appeals' decisions.*

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* See cases cited on pp. 22-25, infra.

The Board based its conclusion on certain statements by Union representatives, and most particularly on the fact that the Union lowered its bargaining demands after Dazzo had been discharged. Viewed separately or in conjunction these facts do not amount to substantial evidence of union coercion or restraint.

The statements referred to by the Board were those by Salvatore that the Employer had "declared war", that "Dazzo is creating trouble", and that the men wanted the proposed contract terms and were not being very flexible because of the layoffs and other conduct which caused the employees to lose money (A. 5,6,8,16,17,42,44,45,54,55). The Board also relied on the remark of McDonald that the "problem is Dazzo . . . and . . . the men [are] upset by the proposed layoffs" (A. 6,17,78,147,148,163,164).

Taking the latter statement first, there is no evidence in the record that McDonald or any other employee had any authority to act as agents of the Union for the purpose of putting pressure on the Employer to get rid of Dazzo, and the Board did not so find. See Plumbers, Local 83 (Power City Plumbing & Heating), 228 NLRB No. 27, 94 LRRM 1428. In fact the Board found that the work stoppage engaged in by the employees to protest the turning away of work was done on their own initiative without union knowledge or support (A. 16). Moreover, McDonald's comment came in response to a question of Atherton, Jr. in the absence of any union officials, and prior to the commencement of negotiations.

In addition, reliance on all or any

of the statements presents the same basic flaw. That the employees were disturbed and angry because of the layoffs and the cuts in pay may be surmised; that the Union threatened or coerced the Employer to discharge Dazzo is mere speculation.

It is at least as likely an inference that both the statements and the Union's bargaining position were based on the employees' justified fears and concern about their jobs and wages.* That those concerns involved Dazzo does not prove that the Union caused his discharge by coercing the Employer. The employees simply wanted as much money as they possibly could obtain in view of the fact that their income and job security had been affected by the layoffs (A. 169).

That the ALJ draws a different inference than the Board from the undisputed facts cannot be ignored. While the Board is not bound by the determination of the ALJ, where there is disagreement between them, "the evidence must be examined with greater care than where both are in agreement". Amalgamated Meat Cutters & Butcher Workers v. N.L.R.B., 276 F. 2d 34 (CA 1 1960). In its landmark decision, Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 496, this Court noted that "[e]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has

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* The ALJ found that this was the "more likely inference" (A.11).

reached the same conclusion". The ALJ's conflicting determination "carried weight against the existence of substantial evidence to support the Board's conclusion" even when the issue does not turn on credibility, "but on the inference reasonably to be drawn from conduct not in serious dispute". N.L.R.B. v. Majestic Weaving Co., 355 F. 2d 854, 859 (CA 2 1966).

The Board's position and finding on the Union's bargaining stance completely ignores the fact that the Union is privileged to engage in hard bargaining without any adverse inference being drawn. The Court of Appeals unenlightening affirmance ignores prior decisions of this Court to that effect. N.L.R.B. v. American National Insurance Co., 343 U.S. 395; N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477; H.K. Porter Co., Inc. v. N.L.R.B., 397 U.S. 99. Section 8(d) of the Act itself provides that the obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession. The Board has held that "mere insistence is not to be equated with the restraint or coercion required . . . to establish an 8(b)(1)(B) violation". Local 80, Sheet Metal Workers (Turner-Brooks, Inc.), 161 NLRB 229, 235.

Finally, against the speculative evidence relied upon by the Board and the Court is arrayed a great deal of contrary direct, probative evidence credited by both the ALJ and the Board which negates the Board's finding that the Union coerced the Employer to discharge Dazzo. This evidence consists of:

a) A finding that the Union never suggested that Dazzo be discharged. Nor did any of the employees make such a request. Similarly the Union never conditioned any bargaining concession or the signing of a contract upon Dazzo's discharge (A. 7,17).

b) Five witnesses unequivocally testified that the discharge of Dazzo was never discussed at any time with the Employer (A. 60,61,124,125,129,149,168).

c) The employees, prior to the start of negotiations, and on their own initiative, engaged in a work slowdown which did not have as an expressed purpose the removal of Dazzo (A. 6.16,46-49,146).

d) Also, prior to the start of negotiations, Atherton, Jr., on his own, solicited the views of the employees concerning the problems in the shop and sought their views on a replacement for Dazzo (A. 6,7,14, 148,163,164).

e) The decision to strike on March 1 if a contract could not be negotiated by then was unrelated to the work slowdown and the layoffs. Dazzo was not an issue in connection with the decision to strike (A. 49-51).

f) The Employer had made the decision to discharge Dazzo prior to the February 27 bargaining session. Ernie Barter, who subsequently replaced Dazzo, informed the employees on February 19 that he had been offered the job (A. 56,57).

g) The Employer's attorney made the

announcement that Dazzo had been discharged "based on what [Atherton, Jr.] had found out through [his] investigations" (A. 8,9, 17,18,71,130,131,149,155,167,168). There is absolutely no proof in the record that the Union played any part in this decision made by the Employer.

h) When the discharge was announced at the February 27 negotiating session Salvatore's reply was that "he was not there to discuss . . . Dazzo's discharge" but "to discuss a contract" (A. 9,17,18,71, 131,150,156).

In the face of all this direct evidence squarely contradicting the inference drawn by the Board, it is impossible not to conclude that the Board based its decision on what it believed were suspicious circumstances. But as prior cases reveal, that does not amount to substantial evidence. Nor can the Board rely on evidence "which gives equal support to inconsistent inferences". Dubin-Haskell Lining Corp. v. N.L.R.B., 375 F. 2d 568,573 (CA 4 1967). See also N.L.R.B. v. Martin A. Gleason, Inc., supra; Torrington Co. v. N.L.R.B., 506 F. 2d 1042,1047,1049 (CA 4 1974). The Court of Appeals decision in this case creates a precedent absolutely at odds with the above cited cases.

It is simply not possible to find, on the evidence before the Board, that the inference the Board drew is even at least as likely as the inference that must be drawn from the direct, credited testimony, namely, that no violation occurred.

The fallacy of the Board's reasoning

is vividly illustrated by its statement that it was "additionally persuaded by the fact that the Employer discharged Dazzo only after it was clear that bargaining was hopelessly stymied. Yet its stated reason involved the events surrounding the work slowdown, which occurred at least a month previously" (A. 20,21).*

The Board's reference to an impasse in bargaining is an obvious afterthought as the Union was not charged with a refusal to bargain and was privileged to engage in hard bargaining. Moreover, the Board found that the Employer's attorney notified the Union and the employees of Dazzo's discharge under circumstances which reveal no coercive element. Surely it is inconsistent for the Board to then use the Employer's remarks, which are in no way binding on the Union, and which the Board found were not made in response to any specific union threat, to draw an inference that the Union must have been responsible for the discharge because the reason given by the Employer is not believed by the Board. The only fact in the record that the Board could rely on is that the Employer made the statement on its own initiative. The reasons stated by the Employer for Dazzo's discharge and its motive in taking the action were not matters within the control of the Union. If the Board wanted to probe the Employer's motive it should have called Atherton, Sr. as a witness.** The Board is limited in

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* This would not be true if Dazzo was discharged on February 11 as he asserted.

** This aspect of the case is discussed in greater detail, infra, p. 26 et seq.

drawing inferences by the facts in the record. There are no facts which warrant any inference that the Union coerced the Employer. The Board may not engage in speculation unsupported by the record, that the Union caused the Employer to discharge Dazzo, based on a statement of the Employer not binding on the Union.

The Court of Appeals affirmance of the Board's finding that the Union engaged in unlawful conduct flies in the face of the general rule that "[a]n unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointed toward the unlawful one". N.L.R.B. v. McGahey, 233 F. 2d 406, 413 (CA 5 1956). See also N.L.R.B. v. Ford Radio & Mica Corp., 258 F. 2d 457 (CA 2 1958).

N.L.R.B. v. Amalgamated Meat Cutters & Butchers, 202 F. 2d 671, 672 (CA 9 1953), a case in which the Court denied enforcement of the Board's order, presented facts analogous to those of the instant cases. In Amalgamated, the Board found that the Union violated the Act by causing the employer to discharge one Wyatt for his refusal to join the Union. The testimony relied on by the Board was given by Wyatt who alleged that during a conversation with a representative of the employer, the latter informed Wyatt not to report to work the following day because the Union representative had indicated that the employer "could not use [him] anywhere in the plant because [he] would not join the union". The court concluded that the Board's findings were based on speculation,

as there was no evidence of any substance to prove the discharge was effected at the request of the union, aside from the hearsay testimony of Wyatt himself.

In a recent decision the Second Circuit refused to enforce an order of the Board, even in the face of testimony credited by the ALJ that the discharged employee had been told he was being discharged for union activity. The Court held that other credited testimony which contradicted that given by the employee was at least as believable. N.L.R.B. v. Grease Co., 94 LRRM 3197 (CA 2 March 30, 1977).

It is thus not unusual for the uncorroborated testimony of an interested witness who stands to profit from a back pay award to be considered by a court to be less than substantial evidence when the record is considered as a whole. See N.L.R.B. v. Plastics Products, Inc., 354 F. 2d 66 (CA 6 1965); Farmers Cooperative Co. v. N.L.R.B., 208 F. 2d 296, 304 (CA 8 1953).

The decision of the Court of Appeals in this case is thus in conflict with innumerable decisions of both this Court and other Court of Appeals and can only create confusion and serve as an inducement to other courts to fail to scrutinize the record and limit affirmance of Board findings to those cases where such findings are supported by substantial evidence. Therefore, this Court should review the decision of the Court of Appeals to clarify the Board's authority to draw inferences to indicate the elements necessary to establish a violation of §8(b)(1)(B), and to demon-

strate to the Courts of Appeals the necessity of strictly adhering to the substantial evidence test.

The decision of the Court of Appeals effectively precludes unions and their representatives from expressing noncoercive opinions concerning employer representatives. If the employer takes action against such representatives the union will be found to have violated the Act and severe penalties will be assessed against it. This violates the right of unions to engage in free speech and it also is contrary to the policy of the Act to protect such noncoercive opinions as expressed in §8(c) of the Act.

2. THE INSTANT CASE, IN WHICH THE COURT OF APPEALS UPHELD THE BOARD'S REFUSAL TO DRAW AN ADVERSE INFERENCE FROM THE GENERAL COUNSEL'S FAILURE TO CALL AS A WITNESS AN INDIVIDUAL WITH KNOWLEDGE OF THE FACTS, PRESENTS AN IMPORTANT QUESTION OF LAW WHICH WAS NOT HERETOFORE PASSED UPON BY THIS COURT.

The ALJ drew an inference that had Atherton, Sr., testified, he would not have corroborated Dazzo's testimony (A. 11). The Board refused to draw the inference stating that it could not be drawn where the witness is equally available to both parties (A. 19). The Board's position is too restrictive. The determination of equal availability and when the inference should be raised depends on "all the facts and circumstances bearing upon the witness' relation to the parties. . . ." Kean v. C.I.R., 469 F. 2d 1183, 1188

(CA 9 1972). See generally 2 Wigmore, Evidence, §288 3rd Ed. 1940.

The inference should have been drawn here since the Board has the burden of proving a violation (Boyles Famous Corned Beef Co., v. N.L.R.B., 400 F. 2d 154 (CA 8, 1967); N.L.R.B. v. Prince Macaroni Mfg. Co., 329 F. 2d 803 (CA 1 1964); 29 CFR §101.10(b)), and based on its investigation before the complaint was issued it could not have been ignorant of the importance of Atherton, Sr.'s testimony to its case. He was the only witness with knowledge of the facts pertaining to the reason for Dazzo's discharge which was, of course, the very point of the Board's complaint. Local 259, could not be epxected to call Atherton. Not only does the Board have the burden of proving a violation of the Act, but the union-employer relationship, at least in the circumstances of this case, is basically antagonistic and thus Atherton, Sr. was not a witness, in any realistic appraisal of the facts, equally available to both parties.

While this Court has not passed upon the precies issue raised it has noted that "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character." Interstate Circuit v. U.S., 306 U.S. 208, 226.

The Second Circuit itself has denied enforcement of a Board order based in part on its unexplained failure to draw an adverse inference in circumstances similar

to those in this case. N.L.R.B. v. Ford Radio & Mica Corp., 258 F. 2d 457,463 (CA 2 1958). In Ford the issue was the motive of the employer in discharging several employees who had temporarily walked out. The employees had informed one Taylor their reason for walking out and Taylor had in turn communicated this information to company officials. The contents of this communication were not brought out, and Taylor was not called as a witness by the Board. The Second Circuit, in refusing to enforce the Board's order relied in part on the proposition that "since proof of motivation of the Employer was part of the General Counsel's case, his refusal to elicit this readily available and crucial testimony of a disinterested witness may well be taken to mean that the information was adverse to his case." Of course, the employer in Ford Radio could also have elicited the testimony, but the court properly placed the onus on the Board which had the burden of proving its case.

In Garchell v. Kantar, 56 F. Supp. 866,868 (D.C. Minn. 1944), an action under the Fair Labor Standards Act, the defendant testified that changes in his bookkeeping practices were the result of instructions received from an official of the Wage and Hour Division. The defendant's failure to call an examiner or agent of the division as a witness was held by the court to warrant the drawing of an unfavorable inference, even though the witness was one who was obviously equally available to both parties. See also International Union (UAW) v. N.L.R.B., 459 F. 2d 1329 (CA DC 1972).

The Board's failure to call as a witness the one person who could corroborate Dazzo's hearsay testimony warranted an inference that had he been called his testimony would have been favorable to the Union.

Since this is an issue that is of great importance to parties and transcends the facts of this particular case, as such situations will recur often in the future, this Court should review and determine the scope of this substantial issue.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue.

Respectfully submitted,

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Of Counsel:

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APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS
for the
Second Circuit

No. 77-4019

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 259, UNITED AUTOMOBILE,
AEROSPACE, AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,

Respondent.

Before: ANDERSON and MANSFIELD Circuit Judges and BRIEANT District Judge. 1/

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America, New York, New York, its officers, agents, and representatives on June 30, 1976. The Court heard argument

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1/ Sitting by designation.

of respective counsel on June 3, 1977, has considered the briefs and transcript of record filed in this cause and at the conclusion of oral argument, handed down its decision enforcing the Board's Order, as modified. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Respondent, Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Demanding of Atherton Cadillac, Inc., the discharge of Anthony Dazzo and conditioning the grant of concessions in bargaining upon compliance with said demand.

(b) In any like or related manner, restraining or coercing the aforesaid Employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Send a written notice to Anthony Dazzo, with a copy to the Employer, stating that it has no objection to his employment or selection as a representative for the purposes of collective bargaining or the adjustment of grievances by the Employer and that it will not question his reemployment or reinstatement.

(b) Make Anthony Dazzo whole for any loss of earnings suffered by reason of its

unlawful conduct in the manner provided in the section of the Board's Decision entitled "The Remedy."

(c) Post at its offices at New York, New York, copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 29 (of the National Labor Relations Board, Brooklyn, New York) after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon reciept thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Resonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and deliver sufficient copies of said notice to the Regional Director for Region 29 for posting by Atherton Cadillac, Inc., at all locations where notices to its employees are customarily posted, if said Employer is willing to so post.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

s/Walter R. Mansfield

Judge, United States Court of Appeals for the Second Circuit

s/Charles L. Brieant

Judge, United States District Court, Southern District of New York, Sitting by designation, United States Court of Appeals for the Second Circuit

FILED: June 30, 1977

225 NLRB No. 55

JPW
D--1441
West Islip, N.Y.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (Atherton Cadillac, Inc.)

and

ANTHONY DAZZO, an Individual

Case 29--CB--2130

DECISION AND ORDER

On March 24, 1976, Administrative Law Judge Alvin Lieberman issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the

exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent restrained or coerced Atherton Cadillac, Inc. (Employer), in violation of Section 8(b)(1)(B) by demanding that it discharge service department general manager, Anthony Dazzo, and by "conditioning the grant of concessions in bargaining and agreement upon a contract" upon compliance with the demand for Dazzo's discharge.

The record reveals that Dazzo was responsible for overall supervision of the Employer's service department employees; his duties included hiring, firing, discipline, scheduling of work, and overseeing the quality of the work. He discussed and settled grievances with the shop steward. On these facts, in agreement with the Administrative Law Judge, we conclude that Dazzo was a representative of Cadillac for the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

One week prior to a representation election held on January 17, 1975,[1] at which Respondent prevailed, Dazzo laid off several employees, including a member of Respondent's organizing committee. He also announced that there would be more layoffs in the future and stated that he intended to reduce an employee's wages. About January 20, 1975, two representatives of Respondent,

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1. All dates hereinafter are 1975.

Salvatore and Elliot, asked Dazzo to recall the laid-off employees. Dazzo refused and Salvatore remarked "this [is] a declaration of war." Thereupon Salvatore and Elliott protested the matter to the Employer's president, Richard Atherton, Sr., who indicated that the business was suffering losses and that Dazzo was in full charge of the shop. To this Salvatore responded "Mr. Dazzo is creating trouble."

Several days after this, the employees noted that work was being turned away from the shop even though there were idle mechanics. The employees believed that Dazzo was responsible and on their own initiative engaged in a work slowdown lasting about 2-1/2 hours. The next day Richard Atherton, Jr., the Employer's vice president, came into the shop seeking the reason for the slowdown. Robert McDonald, a member of Respondent's organizing and bargaining committee, replied "the problem is Dazzo; lighten Dazzo up, he is harassing and threatening the men," he is "turning away work," and the men are "upset by the proposed layoffs." Atherton then asked McDonald and Zegilla whether they had "any recommendations for a new service manager." They suggested an employee who had been a service writer and who was ultimately given the job after Dazzo's discharge.

Collective bargaining began on February 3, and continued until March 3, on which date a contract was agreed upon. Just before the start of bargaining Elliot met with the employees for the purpose of formulating bargaining proposals. A strike deadline of March 1 was agreed upon. There is no evidence that anyone at this or any

other meeting with the employees suggested that Respondent seek the discharge of Dazzo or that Respondent condition any bargaining concessions or the signing of a contract upon Dazzo's discharge.

At the first negotiating session Respondent submitted its proposals and requested that the laid-off employees be recalled. Respondent did not modify any of its proposals or demands regarding the laid-off employees until the last meeting. At one of the mid-February sessions, Salvatore, Respondent's secretary and bargaining spokesman, explained why Respondent refused to make changes in its proposal. He stated your "manager is making things tough, harassing the committee; this is why the men are not being flexible and why they want the contract terms that have been proposed."

At one of the February negotiating sessions, after being informed that Respondent was standing firm with regard to its proposals concerning the outstanding wages issues, the Employer adjourned the meeting for a half hour, and then announced that Dazzo had been discharged.[2] Employer's counsel announced that he had been fired on the basis of what Richard Atherton, Jr.,

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2. The date of Dazzo's discharge is not clear on the record herein. Dazzo testified that he was discharged on February 11. Respondent asserts that the discharge occurred on February 27. The Charging Party has filed a motion to reopen the record seeking to adduce certain evidence relative to this issue. The motion is hereby denied as lacking

had found out through his investigations concerning Dazzo's turning away work and other problems. He further stated "we feel that is the problem and we are going to get rid of the problem forever."

On the evening of February 27, Salvatore met with the employees. The employees, who had previously expressed their dissatisfaction with the slow progress of the negotiations and with the conditions in the shop which were caused by Dazzo, and who had previously stated that they could not work with Dazzo, instructed Respondent's negotiators to lower their bargaining proposals, negotiate past the strike deadline, and settle the contract as quickly as possible, because the biggest problem, Dazzo, was gone. Accordingly, at the next meeting Respondent reduced its wage increase proposals, and with these modifications the Employer acdepted all of Respondent's other proposals.

Dazzo testified regarding his discharge that Atherton, Sr., told him that "union agent . . . demanded that [he] be terminated; [that] they wouldn't negotiate a contract; [and that] if [he] wasn't off the premises that day they would strike." The General Counsel did not call Atherton, Sr., as a witness. In an attempt to corroborate Dazzo's testimony, the General Counsel introduced a letter of reference on Company stationery signed by

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merit. In our view the matters raised therein can be more apparently considered at the compliance stage of the proceeding.

Atherton, Sr., which states that a "Union dispute arose and to avoid a strike, Mr. Dazzo became the focal point of the dispute that made it necessary to relieve Mr. Dazzo of his duties."

The General Counsel and the Charging Party contend that the circumstantial evidence herein leads to the inescapable conclusion that Respondent made it quite clear to the Employer that no bargaining would be accomplished unless Dazzo were removed.

Respondent contends that none of its agents ever demanded Dazzo's discharge or conditioned the grant of bargaining concessions thereon. It contends that its position on the negotiations was not in any way related to a demand for Dazzo's discharge but was merely privileged hard bargaining in response to recent layoffs and expected cuts in salary.

The Administrative Law Judge agreed with Respondent and dismissed the complaint. He concluded that the General Counsel had created at most only a suspicion that Respondent's motive was to secure Dazzo's discharge.[3]

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3. The Administrative Law Judge found that the General Counsel's failure to call Atherton, Sr., as a witness to corroborate Dazzo's hearsay testimony as to the reason for his discharge raises the adverse inference that Atherton, Sr., would not corroborate Dazzo's testimony and would have given testimony favorable to Respondent. He also refused to consider the letter of reference allegedly written by Atherton, Sr., as corroboration because the letter itself is hearsay. We agree as to the hearsay nature of Dazzo's testimony and of the letter; however, we find the adverse inference is improper here since Atherton, Sr., is clearly a witness equally available to both parties.

We do not agree with the Administrative Law Judge's view of the evidence. We find that the evidence, although circumstantial, is sufficient to establish a violation herein.

While it is true that Dazzo's discharge was never openly demanded, the record reveals an extensive pattern of statements and conduct through which Respondent conveyed a clear message to the Employer to discharge Dazzo and evidenced its unlawful motive. Thus, after an argument concerning the layoffs, for which Dazzo was responsible, Respondent's representatives "declared war" on Dazzo. Atherton, Sr., was thereafter told that Dazzo was creating trouble. After the slowdown, McDonald told Atherton, Jr., that the problem was Dazzo and suggested a replacement for him. During the negotiations Salvatore admitted that the bargaining strategy and proposals and the inflexibility with respect thereto were because of Dazzo. In sum, Respondent's message to fire Dazzo and its hostility toward Dazzo were repeatedly communicated to the Employer.

We view as particularly significant the fact that shortly after Dazzo's discharge

Respondent substantially lowered its bargaining demands[4] and agreed to negotiate past the strike deadline of March 1; in fact, agreement was reached on March 3. This change in bargaining strategy occurred after Salvatore met with Cadillac's service department employees on February 27. At this meeting, the employees, who had previously protested the shop conditions for which Dazzo was responsible and who had previously said they could not work with Dazzo, told Salvatore to try and wrap up negotiations, modify their bargaining proposals, and reason with management, because the biggest problem, Dazzo, was gone. We are additionally persuaded by the fact that the Employer discharged Dazzo only after it was clear that bargaining was hopelessly stymied. Yet its stated reason involved the events surrounding the work slowdown, which occurred at least a month previously.

On the basis of all the foregoing we find that Respondent has violated Section 8(b)(1)(B) of the Act by engaging in a course of conduct during negotiations by which it restrained and coerced the Employer in the selection of Anthony Dazzo as its representative for the adjustment of grievances.

The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth above, occurring in connection with

4. Respondent reduced its wage increase proposal for mechanics from $1.50 an hour to $1.11 an hour and also reduced the amount of its lower incentive proposal for polishers.

the operation of Atherton Cadillac, Inc., as described in section I of the Administrative Law Judge's Decision, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act.

Specifically, we shall order that Respondent Union be required to send a letter to the Charging Party, with a copy to Atherton Cadillac, Inc., his former employer, stating that it has no objection to his employment or selection as a representative for the purposes of collective bargaining or the adjustment of grievances by the Employer and will not question his reemployment or reinstatement. We shall further order Respondent to make Anthony Dazzo whole for any loss of earnings suffered by reason of its unlawful conduct, by payment to him of the sum of money equal to the amount that he would have earned from the date of the discrimination against him, less net earnings during said period.[5]

5. We are aware that on October 16, 1975, Respondent sent a letter to the Employer

Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in F.W. Woolworth Company, 90 N.RB 289, 291-295 (1950), and Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Conclusions of Law

1. By demanding that Atherton Cadillac, Inc., discharge Anthony Dazzo and by conditioning the grant of concessions in bargaining upon compliance with said demand Respondent has restrained and coerced Atherton Cadillac, Inc., and thereby has engaged in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

The aforesaid unfair labor practice is an unfair labor practice within the meaning of Section 2(6) and (7) of the Act.

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informing it that the Union had no objection to the employment of Anthony Dazzo. There is no evidence that Dazzo was ever made aware of this letter. Dazzo testified that 3 days before, on October 13, 1975, Atherton, Sr., after stating that he had checked with union representatives, told him he could have his job back if he would drop his suit against the Union. As we are unable to ascertain from the record all the events surrounding these communications, we shall leave to the compliance stage of the proceeding the determination of the significance of these events on any backpay liability.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 259, United Automobile, Aerospace, and Agricultural Implement Workers of America, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Demanding of Atherton Cadillac, Inc., the discharge of Anthony Dazzo and conditioning the grant of concessions in bargaining upon compliance with said demand.

(b) In any like or related manner, restraining or coercing the aforesaid Employer or any other employer in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Send a written notice to Anthony Dazzo, with a copy to the Employer, stating that it has no objection to his employment or selection as a representative for the purposes of collective bargaining or the adjustment of grievances by the Employer and that it will not question his reemployment or reinstatement.

(b) Make Anthony Dazzo whole for any loss of earnings suffered by reason of its unlawful conduct in the manner provided above in the section entitled "The Remedy."

(c) Post at its offices at New York, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspic ous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Sign and deliver sufficient copies of said notice to the Regional Director for Region 29 for posting by Atherton Cadillac, Inc., at all locations where notices to its employees are customarily posted, if said Employer is willing to so post.

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6. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.
June 30, 1976

Howard Jenkins, Jr., Member

John A. Penello, Member

Peter D. Walther, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

No. 77-480

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

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LOCAL 259, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The oral opinion of the court of appeals is unreported. The National Labor Relations Board's decision and order (Pet. App. A5-A17) are reported at 225 NLRB 421.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A4) was entered on June 30, 1977. The petition was filed on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The decision of the Administrative Law Judge is not included in the appendix. It is reported at 225 NLRB 421, 424-428.

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that a union violated Section 8(b)(1)(B) of the National Labor Relations .Act by coercing an employer into discharging its general service manager.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 2-3.

STATEMENT

The following facts were found by the National Labor Relations Board. Early in 1975, petitioner (herein "the Union") won a representation election among the service department employees of Atherton Cadillac, Inc. (herein "the Company"). (Pet. App. A6.) During the last week of the organizational campaign which preceded the election, Company General Service Manager Anthony Dazzo, in an effort to discourage union support, laid off several employees (including a member of the Union's organizing committee), announced that there would be further layoffs the following week, and stated that he intended to reduce an employee's wage (Pet. App. A6). Several days after the election, Union Secretary Louis Salvatore and Union representative Steven Elliot asked Dazzo to recall the laid-off employees. When Dazzo refused, Salvatore stated that "this was a declaration of war." (Pet. App. A6-7.) The next day Salvatore and Elliot asked Company President Atherton, Sr., to recall the laid-off employees. Atherton, Sr., responded that the business was suffering losses and asserted that Dazzo was in charge of the shop. Salvatore replied that "Mr. Dazzo is creating trouble." (Pet. App. A7.)

Several days later mechanics in the service department engaged in a two-hour work slowdown to protest a turning away of work which they believed had been ordered by Dazzo. The next day Company Vice President Atherton, Jr., asked two members of the Union organizing and bargaining committees what had prompted the slowdown. They explained that "the problem is Dazzo." Atherton, Jr., asked the two men if they had any recommendations for a replacement for Dazzo; they suggested an employee, who was given the job following Dazzo's subsequent discharge. (Pet. App. A7.)

Thereafter, on February 3, bargaining negotiations began. Previously the employees had agreed to a strike deadline of March 1 should negotiations not prove successful by that date. At the opening bargaining session the Union set forth its initial proposal. At none of the ensuing five bargaining sessions in February would the Union modify its initial demands. Rather, Union Secretary Salvatore informed the Company that the Union was refusing to change its proposals because Dazzo was "making things tough, harassing the committee, this is why the men are not being flexible, and why they want the contract terms that have been proposed." (Pet. App. A8.)

After being informed at the February 27 session that the Union was still not inclined to make changes in its proposals, the Company negotiators asked for a half-hour adjournment. When bargaining resumed, Company attorney Stone announced that Dazzo had been discharged, and further stated "we feel that is the problem and we are going to get rid of the problem forever." (Pet. App. A8-9.)

That evening, the service department employees met with the Union negotiating representatives. The employees now urged the negotiators to lower their bargaining proposals and reach a contract as quickly as possible because the biggest problem—Dazzo—was gone. (Pet. App. A9.) Accordingly, at the next bargaining session, the Union reduced its wage increase and incentive proposals, and, with these modifications, agreement was reached and the parties entered into a contract. (Pet. App. A9, 11-12 n. 4.)

On a charge by Dazzo, the Board's General Counsel issued a complaint alleging that the Union had violated Section 8(b)(1)(B) of the Act[2] by conditioning concessions and agreement in the contract negotiations upon the discharge of Dazzo (Pet. App. A6). After a hearing the Administrative Law Judge dismissed the complaint. The Board reversed. It found "that the evidence although circumstantial was sufficient to establish [the violation charged]" (Pet. App. A11—A13).

The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practice found, to withdraw all objections to Dazzo's employment at the Company, and to make Dazzo whole for any loss of earnings suffered by reason of its unlawful conduct (Pet. App. A15).

The court of appeals enforced the Board's order with a minor modification not relevant here (Pet. App. A1-A4).

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[2]Section 8(b)(1)(B) provides that it is an unfair labor practice to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Dazzo's status as such an employer representative is undisputed.

ARGUMENT

Petitioner's principal claim (Pet. 2, 10-11)—that the Board's holding here "unlawfully restricts the constitutional right of unions to express opinions that are non-coercive in nature"—is not presented on this record because the Board found, as a fact, that the Union's statements were part of a course of conduct which constituted restraint and coercion. The only question actually presented therefore is whether substantial evidence supports that finding.[3] This essentially factual question has been thoroughly considered by the court of appeals and there is no reason for further review by this Court.

Although the Union did not explicitly demand that Dazzo be discharged, there was ample evidence to warrant the Board's conclusion that the Union conditioned relaxation of its bargaining position on the discharge of Dazzo—particularly in view of the Union's swift reduction of its demands and agreement to a contract immediately following Dazzo's discharge. As the Board found (Pet. App. A11—A12):

> While it is true that Dazzo's discharge was never openly demanded, the record reveals an extensive

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[3]Section 8(c) of the Act, 29 U.S.C. 158(c), provides that the "expressing of any views * * * shall not constitute or be evidence of an unfair labor practice * * * if such expression contains no threat of reprisal * * *," but this provision does not protect statements which are part of a course of conduct violative of the Act. See *National Labor Relations Board* v. *Gissell Packing Co.*, 395 U.S. 575, 617-620; *National Labor Relations Board* v. *Kropp Forge Co.*, 178 F. 2d 822, 827-829 (C.A. 7), certiorari denied, 340 U.S. 810. In any event petitioner did not raise its contentions concerning Section 8(c) (Pet. 10-11) before the Board or the court of appeals. Under settled principles, it therefore cannot raise them here. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256; *National*

pattern of statements and conduct through which Respondent conveyed a clear message to the Employer to discharge Dazzo and evidenced its unlawful motive. Thus, after an argument concerning the layoffs, for which Dazzo was responsible, Respondent's representatives "declared War" on Dazzo. Atherton, Sr., was thereafter told that Dazzo was creating trouble. After the slowdown, McDonald told Atherton, Jr., that the problem was Dazzo and suggested a replacement for him. During the negotiations Salvatore admitted that the bargaining strategy and proposals and the inflexibility with respect thereto were because of Dazzo. In sum, Respondent's message to fire Dazzo and its hostility toward Dazzo were repeatedly communicated to the Employer.

We view as particularly significant the fact that shortly after Dazzo's discharge Respondent substantially lowered its bargaining demands and agreed to negotiate past the strike deadline of March 1; in fact, agreement was reached on March 3. This change in bargaining strategy occurred after Salvatore met with Cadillac's service department employees on February 27. At this meeting, the employees, who had previously protested the shop conditions for which Dazzo was responsible and who had previously said they could not work with Dazzo, told Salvatore to try and wrap up negotiations, modify their bargaining proposals, and reason with management, because the biggest problem, Dazzo, was gone. We are additionally persuaded by the fact that the Employer

Labor Relations Board v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *Duignan* v. *United States*, 274 U.S. 195, 200; *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

discharged Dazzo only after it was clear that bargaining was hopelessly stymied. Yet its stated reason involved the events surrounding the work slowdown, which occurred at least a month previously. [Footnote omited.]

The Board's inference of unlawful Union motivation thus was supported by substantial evidence on the record taken as a whole.[4] *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 602.

[4]Petitioner's further contention (Pet. 26-29) that the Board improperly refused to draw an adverse inference from the General Counsel's failure to call Company President Atherton, Sr., as a witness similarly presents no issue for this Court. Dazzo, who was the charging party in this case, testified that Atherton, Sr., told him that he had been discharged because of pressure from the Union. The General Counsel presented a letter of reference on Company stationery signed by Atherton, Sr., stating that Dazzo had been discharged "to avoid a strike." (Pet. App. 9-10.) Atherton, Sr., was not called to testify by either party. Since the Company was not aligned in this dispute with either Charging Party Dazzo or the Respondent Union, Atherton, Sr.—as president of the Company—was equally available to either side of the dispute. Consequently, the Board was not compelled to draw an inference adverse to Dazzo's testimony due to Atherton's absence from the trial. See, *e.g.*, *National Labor Relations Board* v. *A.P.W. Products Co.*, 316 F. 2d 899, 903 (C.A. 2). In any event, the Board did not rely on Dazzo's testimony in reaching its conclusion because it agreed with petitioner that the disputed testimony was hearsay. (See Pet. App. A11-A12.) Thus, even if the Board erred in failing to draw the adverse inference, the error was not prejudicial. *National Labor Relations Board* v. *Paul Blazevich*, 374 F. 2d 974, 981, (C.A. 9), certiorari denied, 389 U.S. 913.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

DOJ-1977-12

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-480

LOCAL 259, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ANTHONY DAZZO,

Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF INTERVENOR IN OPPOSITION.

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF INTERVENOR IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On February 16, 1977, Anthony Dazzo, moved in the court below to intervene as a party to this action pursuant to Rule 15 (d) of the Federal Rules of Appellate Procedure, and that motion was granted on February 23, 1977.

"A" references herein designate page numbers of the Appendix in the Court of Appeals.

QUESTION PRESENTED

Whether there was substantial evidence to support the finding of the National Labor Relations Board, and the court below, that Local 259 violated § 8 (b) (1) (B) of the National Labor Relations Act by restraining or coercing an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances?

STATEMENT OF THE CASE

The petitioners description of the events herein omits certain facts which we would point out:

In addition to Louis Salvatore ("Salvatore") and Steve Elliott ("Elliott") who were salaried officials of the union, Local 259 called as witnesses Edward Zegilla ("Zegilla") Robert McDonald ("McDonald") and Walter Sitler ("Sitler"). Zegilla, McDonald and Sitler, who in addition to being employees of Atherton Cadillac, Inc. ("Cadillac") were Local 259's organizing committee prior to its certification as Cadillac's collective bargaining representative, (A33) and after such certification these same men, together with Salvatore and Elliott formed Local 259's committee to negotiate a contract with Cadillac. (A 34).

Elliott testified that, prior to Dazzo's discharge, that he had a meeting with the employees of Cadillac in order to discuss contract proposals, and at this meeting the employees were very upset and calling Dazzo most every name under the sun (A 68). Despite the fact that the employees did not demand that Dazzo be terminated, Elliott said he knew that they wanted Dazzo to go because of the language they used in describing him. (A 75) When Elliott was questioned

if the employees asked him to bring us Dazzo's status in the negotiations, Elliott replied: "No , No, I don't recall. I don't recall. Possibly, I don't recall". (A 68).

Similarly, Zegilla testified that it was a general feeling amongst the men that they wanted as much money as they could get so long as Dazzo was there. Zegilla said that he believed this despite the fact that he testified that the men themselves never voted on Dazzo's removal and never discussed how they felt. (A69)

Sitler testified that prior to Dazzo's discharge, he had knowledge and there was talk among the bargaining committee that Dazzo might be terminated. (A 124). Dazzo testified that Sitler admitted to him that he was aware that Dazzo was going to be terminated a week before it happened and when Sitler raised his objection, he was told by the other members of the negotiating committee to shut up and dont make waves, that they know whats best for the shop. (A 109).

Elliott testified that, on January 30th, he received a telephone call from Local 259's president that there was a work stoppage at Cadillac. (A47) This work stoppage or slowdown, occurred because Mc Donald claims he observed one customer being refused service by a Cadillac service writer. Then Mc Donald claims that he, without checking with either Dazzo or Mr. Atherton, told the Cadillac employees that Dazzo was turning away work. (A145-46, 154-55)

Elliott admitted that he did not admonish or even critize McDonald for the slowdown that he initiated, or for his comments to Atherton Jr. that the problem is Dazzo and suggesting that Dazzo be replaced by Ernie Barter who was a member of Local 259 (A 147-48).

Elliott testified that not only did he take a strike vote of the employees on January 31st, but that he distributed strike signs to McDonald in the parking lot of Cadillac on January 31st. (A 48). This was a month prior the time when Local 259 allegedly intended to strike. (A 48-49).

Elliott testified that the respondent's negotiating committee was informed of Dazzo's discharge by Atherton Sr. (A 71) and that when respondent's agents reported the progress of the negotiations to the men, "they were thrilled to death when they heard Tony got the axe." (A 71)

Zegilla stated that Dazzo's termination was a "large event in the contract negotiations, not easily forgettable". He thought it more important than obtaining a holiday. (A 167)

THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

In the trial herein the Intervenor, then called the Charging Party, was represented only by the General Counsel for the National Labor Relations Board. At the conclusion of the trial the Administrative Law Judge ("ALJ") directed that both the General Counsel and the attorneys for Local 259 submit briefs supporting their respective positions. However, the General Counsel failed to submit a brief. The attorneys for Local 259 did submit a brief which was the only brief before the ALJ when he rendered his decision.

THE DECISIONS of the BOARD and the COURT of APPEALS

Subsequent to decision of the ALJ the Intervenor's Counsel and the General Counsel filed briefs

excepting to the decision of the ALJ, and the attorney's for Local 259 filed another brief in opposition thereto. The Board did not adopt the decision the ALJ but found against Local 259. Thereafter, the Court of Appeals unanimously affirmed the Board after considering additional briefs submitted by the parties and hearing oral argument.

REASONS FOR DENYING THE WRIT

1. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS ARE IN ACCORD WITH PAST PRECEDENT AND PJBLIC POLICY AND THERE IS SUBSTANTIAL EVIDENCE IF NOT OVERWHELMING EVIDENCE TO SUPPORT THEIR DECISIONS.

a) Local 259 Did Restrain Or Coerce The Employer Within The Meaning Of The Act.

Local 259 mentions free speech guaranteed by the Constitution in the caption of its first argument but fails to mention it thereafter. The free speech arguments, either under the Constitution or § 8 (c) of the Act, were not raised below. Apparently, Local 259's arguments on this point are that its conduct was merely an expression of views protected by § 8 (c) of the Act and, inasmuch as Unions do not control employers, its noncoercive statements cannot form the basis for a finding of a violation of the Act.

We believe that Local 259 is begging the question by these arguments. Section 8 (c) of the Act would shield Local 259 only if its "expression contains no threat of reprisal or promise of benefit" and, of course, if its statements, or for that matter its conduct were noncoercive then Local 259 did not violate the Act. However, that its conduct expressed a threat of reprisal or promise of benefit, and was coercive was the factual finding of the

Board.

The decisions below were based upon the facts in this case. This is not the type situation where a court of appeals has rendered a decision in conflict with this court or another court of appeals, or decided a state or territorial question, or the court of appeals so far departed itself, or sanctioned a departure by a lower court, from usual judicial proceedings. The decisions below turned on the facts herein. There is no dispute as to the law; if Local 259's conduct was coercive then it violated the Act, and if it's conduct was noncoercive then it did not violate the Act.

The first premise of Local 259 on the point that they did not coerce the employer is that there is no evidence that their tactics involved physical force, or threats of force or economic reprisal. Therefore, they contend that there is no evidence that they coerced the employer.

Apparently, Local 259 is implying that "coercion" and physcial force are synonymous. For that proposition they rely on NLRB v. Drivers, Chauffers, Helpers Local Union No. 639, etc., 362 U.S. 274. The question in that case, as stated by the Court, was "whether peaceful picketing by a union, --- is conduct of the union" to restrain or coerce" employees under § 8 (b) (1) (A) of the National Labor Relations Act ---." at 275. The Court stated that unions had the right to strike and to prohibit peaceful picketing would obviously impede the right to strike, and that Congress has been rather specific when it has come to outlaw economic weapons of the union. at 282-283. The Court stated that picketing is a sensitive area, and that the central theme of thelegistrative debate on this statute was not the curtailment of the right to

peacefully strike, but rather the elimination of the use repressive tactics bordering on violence or involving particularized threats of economic reprisal at 287.

Clearly, the cited case is concerned with a unions right to peacefully picket which is much different from the issues present in the instant situation. The Court did not equate "coercion" with physical force, but did equate it with threat of reprisal, or force, or promise of benefit, at 284.

Local 259 did not have the right to have Dazzo terminated, but they did have the obligation to bargain in good faith with the employer absent the condition that Dazzo be terminated. Their insistance on the latter condition was under threat of economic reprisal or promise of benefit. Specifically, that they would reduce their demands and enter into good faith negotiations with the employer. This fact was made clear to Atherton Sr. by their conduct, and by Salvatore at a negotiating meeting: "Your manager (Dazzo) is making things tough, harassing the committee, this is why the men are not being flexible and why they want the contract terms that have been proposed." (A 72, 73).

Although the case cited by Local 259 does not support its position, it is appropriate to consider how therein the Supreme Court took pains to ascertain congressional intent in order to determine the meaning of 8 (b) (1) (A). Similarily, in the present case the Court need only look to statements made by the authors of 8 (b) (1) (B) to determine what the Act was intended to prevent:

> "In the Senate Report No. 105 on S. 1126 in explaining Section 8 (b) (1) (B), it was stated:

> ...also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

In the Congressional Record of April 23, 1947, page 3953, Senator Taft in explaining this section said... employees can not say to their employer, "We do not like Mr. X. We will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." (or negotiate a contract).

On April 28, 1947, Senator Ellender (p. 4266 in the Congressional Record) spoke in support of the legislation as follows:

> "I shall now deal briefly with strikes invading the perrogatives of management... The Bill, in subsection 8 (b) (1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representatives or in the selection of a personnel director or foreman or other supervisory officials. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foreman. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership

> of the Union. This amendment seeks to describe a remedy in order to prevent such interference".

This is precisely the activity which was engaged in by the union in the present case.

Local 259 seems to claim that they merely suggested or persuaded Atherton, Sr. to terminate Dazzo, and such cannot be construed as a restraint or coercion. This position is completely untenable.

> "A threat directed to an employer to shut down a job unless an employer complies with a union demand to remove a supervisor and its' representatives from the job is the most obvious kind of statutory coercion"
> San Francisco-Oakland Mailers Union # 18
> (172 NLRB 248, 252 -69 LRRM 1157 1968)

Here,a work stoppage was initiated to protest Dazzo which is more than a mere suggestion. In addition, there was a threat of a strike, actual signs were prepared and negotiations were stymied. All of these acts were directed at Dazzo's removal. Surely this conduct amounted to more than a mere suggestion, and the Board so found.

Moreover the cases cited by Local 259 are not applicable to the present case. Petitioner cites Local 80, Sheet Metal Workers (Turner-Brooks, Inc. 161 NLRB 229. In that case, the union demanded that Turner-Brooks sign a contract that included a non mandatory provision. The union threatened to strike and did in fact strike. But the parties stipulated not to raise these issues of the threat and the strike so the

Board naturally found no violation of 8 (b) (1) (B). In effect they invited the Board not to find a violation. The same result might be reached here if we had stipulated not to raise any issues as to Local 259's actions, and then asked the Board to consider whether the union had violated the Act.

Local 259 also cites Sakrete of Northern California Inc. v. NLRB - 332 F 2d, 909 (9th cir. 1964) cert. den 379 U.S. 961. First of all this case did not involve an 8 (b) (1) (B) violation. The union proposed that supervisors be covered by the union agreement. The employer could have rejected this proposal but instead refused to bargain at all. The court held that the refusal to bargain by the employer was unlawful. Here the union refused to bargain in good faith until Dazzo was removed. Apparently this case supports the intervenor's position.

In summary Dazzo claims that he was wrongfully discharged in violation of section 8 (b) (1) (B) of the act and the Board so found. There was far more than a persuasion or a mere suggestion. See e. g. Local 423, Laborers' Int. Union of N. America (Mansfield Flooring Co.) 195 NLRB 241; Communication Workers of America, Local 2550, 195 NLRB 945; International Typographical Union, 86 NLRB 951; Los Angeles Cloak Joint Board, ILGWU (Helen Rose Co.) 127 NLRB 1543; N. L. R. B. v. Local 964, United Bro. of Carpenters, 447 F 2d 643 (CA 2 1971).

In fact, in N. L. R. B. v. Local 964, United Bro. of Carpenters 447 F. 2d 643 (2d cir. 1971), the union suggested to various contractors that they were members of the wrong association. They also told the contractors that it would be wise to sign contracts with the union individually rather than through the association. The court stated:

> "We have held that the right of employees and the corresponding right of employers--- to choose whom ever they wish to represent them in formal labor negotiations is findamental to the statutory scheme" G.E. v. NLRB 412 F 2d 512, 516 (2d cir 1969).

Thus the court found that the union "suggestions" amounted to threats and coercion hence violating section 8 (b) (1) (B) of the Act.

b) The Substantial Evidence Test

"Substantial in this context means such evidence as would prevent the direction of a verdict in a jury trial". NLRB v. Grease Co. 94 LRRM 3197 (2d cir. Mar. 30, 1977), or "upon the motion of a defendant for a directed verdict, the trial judge should overrule the motion unless, viewing the evidence in the light most favorable to the plaintiff, there would be no substantial evidence to support a jury verdict if returned for him. This principal is so well settled as to require no citation of authority". Hinton v. Dixie Ohio Exp. Co. 188 F 2d. 121, 124 (6th cir. 1951). See also Baltimore & Or Co. v. Postom 177 F 2d. 53 (D.C. cir. 1949); Thompson v. Lillehei 273 F. 2d 376 (8th cir. 1959); Schneider v. Chrysler Motors Corp. 401 F 2d 549 (8th cir. 1968).

We agree with petitioners position that it has to be more than a scintilla. It is submitted that not only is there substantial evidence but there is overwhelming evidence here:

January 10 -- Dazzo laid off Zegilla and five or six other employees. (A98-99);

January 17 -- Dazzo had a dispute with Zegilla and Salvatore. (A 176, 175, 10);

January 20 -- After another argument, Salvatore declares war on Dazzo. (A 42);

January 21 -- Salvatore tells Atherton Sr. that Dazzo is causing trouble. (A 45);*

January 22 -- Elliott and Zegilla know from a meeting of the employees, that they don't like Dazzo and want him to go. (A 75, 169);

January 30 -- McDonald causes a work stoppage to protest Dazzo. Atherton Jr. asked why the men stopped work. McDonald replied that it was because of Dazzo, and recommended a replacement for Dazzo. (A 148);*

January 31 -- Elliott took a strike vote of the Cadillac employees and distributed strike signs to McDonald. (A 49).

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* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings.

Feb 3 or 11 -- Salvatore tells Atherton Sr. that the respondent proposed the contracts that it did, and is being inflexible, because of Dazzo. (A 72;*

Feb 11 or 27- Atherton Sr. fires Dazzo and tells him that he did so because respondent demanded it in order to negotiate a contract. (A 103, 35);*

Zegilla says Dazzo's termination was a large event in the contract negotiations. (A 167);

Elliott says the men were thrilled to death when they heard Dazzo got the axe. (A 71);

Salvatore and Elliott said because Dazzo was fired, they were told by the employees to reduce their demands. (A 57);*

February 27-- Union demands substantially lowered - union agrees to work past strike deadline. (A 57);*

March 3 -- Contract is signed with reduced demands accepted. (A 58);*

It is not the function of the court to make de novo finding of fact or substitute its own opinion for that of the Board. NLRB v. Custom Chair, 422 F 2d 1300

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* Indicates that both the Administrative Law Judge and the Board substantially included these facts in their findings.

(9th cir. 1970). The court should up hold the decision of the Board even when the court might reach a different decision or conclusion. NLRB v. Local 3 IBEW AFL-CIO, 477 F. 2d 260 (2d Cir. 1973) cert. den. 414 1065.

The instant case has already been thoroughly briefied and argued by both sides and then considered by the Board and the Court of Appeals, both of which found in favor of the Respondent.

c) The Inferences Drawn By The Board Were Based On Substantial Evidence

Local 259 devotes a great deal of its arguments in attempting to substitute its reasoning for that of the Board. "This type of approach confuses the issue. The real issue is: "Is there substantial evidence to support the Board's findings?"

It is true that there have been cases where the Board's findings were found not to be based on substantial evidence. For example, where the only evidence was the sole testimony of the affected employee who stood to gain substantially by his reinstatement with back pay. This is true in the cases cited by the respondent. All have a common element. There was evidence that the employee was fired for misconduct or incompetence. See e.g. Farmers Cooperative Co. v. NLRB, 288 F. 2d 296 (8th cir. 1953); NLRB v. Grease Co., 94 LRRM 3197 (2d cir. 1977) However, this is not the posture of the present case, the board did not base its decision on Dazzo's testimony - "Hearsay" - in fact it did not even consider his testimony, but based on Local 259's witnesses found:

"While it is true that Dazzo's discharge was never openly demanded, the record reveals an extensive pattern of statements and conduct through which respondent conveyed a clear message to the employer to discharge Dazzo and evidenced its unlawful motive. Thus, after an argument concerning the layoffs, for which Dazzo was responsible, respondent's representatives "declared war" on Dazzo. Atherton Sr., was thereafter told that Dazzo was creating trouble. After the slowdown, McDonald told Atherton Jr., that the problem was Dazzo and suggested a replacement for him. During the negotiations, Salvatore admitted that the bargaining strategy and proposals and the flexibility with respect thereto were because of Dazzo. In sum, respondent's message to fire Dazzo and its hostility toward Dazzo were repeatedly communicated to the employer".

"We view as particularly significant the fact that shortly after Dazzo's discharge respondent substantially lowered its bargaining demands and agreed to negotiate past the strike deadline of March 1; in fact, agreement was reached on March 3. This change in bargaining strategy occured after Salvatore met with Cadillac's service department employees on February 27. At this meeting, the employees, who had

> previously protested the shop conditions for which Dazzo was responsible and who had previously said they could not work with Dazzo, told Salvatore to try and wrap up negotiations, modify their bargaining proposals, and reason with management because the biggest problem, Dazzo was gone. We are additionally persuaded by the fact that the employer discharged Dazzo only after it was clear that bargaining was hopelessly stymied." (A 20).

The facts in this case are almost identical to Communications Workers of America Local 2550, 195 NLRB 945. In that case 300 workers walked out claiming to have numerous grievances. The company and the union tried to negotiate these grievances but got stymied on their negotiations. The union informed the employer that "Grimes (Dazzo) was at the heart of the problem and that the employees would be more inclined to return to work if Grimes (Dazzo) was removed from (his) position." Subsequently the company diluted Grimes authority and the company and the union worked out their grievances and the employees returned to work. Although Grimes was not fired, nor transferred to ALJ found a violation of 8 (b) (1) (B) of the Act.

Here in this case, Atherton and the Union were stymied over contract negotiations. Salvatore, a union official told Atherton that the union is being inflexable because of Dazzo. McDonald told Atherton Sr. "the problem is Dazzo". Atherton fired Dazzo and said the problem is gone. (A 130-31). Dazzo is fired, the union lowers its demand and an agree-

ment is reached. But, here in addition to Salvatore's statement, there is other volumonous evidence that the union wanted Dazzo to go - Salvatore declared was on Dazzo - Salvatore told Atherton that Dazzo is causing trouble - a work stoppage is commenced to protest Dazzo - and Dazzo is finally fired. It is submitted that there is not only substantial evidence but overwhelming evidence. See NLRB v. Bausch and Lomb Inc. 526 F 2d 817 (2d cir. 1975).

Another point raised by Local 259 which should be quickly put to rest is that there is no evidence in the record that McDonald or any other employee had any authority to act as agents of the union for the purpose of putting pressure on the employer to get rid of Dazzo. Apparently, what it is being referred to here is a work stoppage which was initiated by McDonald and McDonald's remark to Atherton Jr. that the "problem is Dazzo" and his suggestion of a replacement. In effect the Local 259 is saying because no union officials were present or McDonald had no authority, the union cannot be held responsible. This is not correct. The stoppage was called to put pressure on the employer to get rid of Dazzo, and McDonald so informed Atherton. The union knew of the stoppage and Mc Donald's statement and not only took no action, but did not even question McDonald about it. In other words, they approved it.

In United States Steel v. U.M.W. § 19F 2d 1249 the court stated that a union should take action against its agents to purge itself of an inference that the union condoned its activities.

Stated simply when a member, (McDonald) who is also a member of the unions organizing committee, institutes a work stoppage for an illegal purpose to wit - to pressure the employer to remove Dazzo which is a violation of 8 (b) (1) (B). The union cannot close their eyes and be idle and claim lack of authority. See Tennaco v. Teamsters, 520 F 2d 945. The fact that no disciplinary action is taken is a factor to consider in determining whether the union authorized such illegal activities. See NLRB v. Local 815 BEW, 290 F. 2d 99, 103-104, NLRB v. ILA Warehouse Union 283, F 2d 558. Common law principals of agency apply and lack of action on the part of the union can create an adverse inference; actual ratification is not necessary. See NLRB v. Local 3 IBEW, 467 F 2d 1158 (2d cir. 1972) See also 29 U.S.C. § 185 (e).

Here McDonald caused a stoppage to force Dazzo out and that was his stated purpose of causing the stoppage. He was not just an ordinary union member, but actively negotiated a contract on behalf of the union and was a member of its organizing and negotiating committees. The union by its inactivity acquiesced to his actions and are bound by them. U.S. Steel v. UMW, Supra.

2. IN THE INSTANT CASE THE BOARD, BASED ON WELL ESTABLISHED PRINCIPLES OF LAW, PROPERLY REFUSED TO DRAW AN ADVERSE INFERENCE FROM THE GENERAL COUNSEL'S FAILURE TO CALL AS A WITNESS AN INDIVIDUAL WHO WAS EQUALLY AVAILABLE TO BOTH SIDES.

It is true that there are situations in which

an adverse inference may be drawn for failure to call a witness who might give relevant testimony. But those cases are limited to instances where the witness is under the control of the party. The rule has nothing to do with who has the burden of proof. Petitioner cites cases which hold that the Board has the burden of proving a violation. We do not dispute that the Board has the burden of proving an 8 (b) (1) (B) violation by substantial evidence. But none of the cited cases hold that the party who has the burden determines whether or not to draw an inference.

The test is rather, was the witness under the control of one of the parties or was he equally available to both parties. In the former instance the courts have held an adverse inference may be drawn. In one case cited by the union the court held that an adverse inference was proper because the witness was an employee and under the control of the claiming party. Kean v. CIR. 469 F 2d 1183. However, the same court went on to state that:

> "When a potential witness is equally available to both parties, no inferences should be drawn from the failure of a party to call such witness". at 1187

This principal has been a long standing rule of evidence. See 2, Wigmore, Evidence Section 288, McCormack, Evidence § 249. Wagner v. U.S., 264 F 2d 524, 531 (9th cir. 1959) cert den 360 U.S. 963. Lannon v. United States, 401 F 2d 504 (9th cir. 1968); Johnson v. United States, 291 F 2d 150 (8th cir. 1961)

In this case, Atherton was Dazzo's former employer, but he had a contractual relationship with the union - he was both physically available and legally available to both parties. See Sarnish v. United States. 223 F 2d 358, 365 (9th cir 1955).

Local 259 relies on NLRB v. Ford Radio & Mica Corp. 258 F 2d 457 (2d cir. 1958). The witness involved was disinterested. There was substantial evidence that employees were striking to force management to rehire a supervisor. The only evidence to the contrary was the sole unsupported testimony of the claimant - indeed his testimony was contradicted. The only way he could have supported his claim was by producing a disinterested witness, a policeman. He did not and the court drew an unfavorable inference.

This is not the case here - Dazzo's testimony was not even considered. Atherton was not a disinterested witness - he had a contract with the union which was charged with the present violation, and presumably would be interested in preserving labor peace. At the time of the hearing Dazzo had no relationship to Atherton. If anything the witness was more available to the union. So the Board was correct in refusing to draw an adverse inference. See Wigmore, Evidence Section 288.

It stretches legal reasoning that this issue justifies the granting certiorari. The legal principal is well established. Its application like the major premise herein, coercion, is dependent upon the facts in the particular case. None of the criteria are present which ordinarily are concomitant with Supreme Court review by certorari. "As has been many times declared this is a jurisdiction to be exercised sparingly and only

in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions." Hamilton-Brown Shoe Co. v. Wolf Bros. Co., (1916) 240 U.S. 251, 258, 36 S. Ct 269, 60 L. Ed 629.

In the present instance, there are no commanding constitutional issues, no problems of foreign relations, and no decisions in conflict. Petitioner is really asking the Supreme Court to review a factual issue with the hope in mind that lower court error might exist. As Chief Justice Vinson said in an address to the American Bar Association in 1949:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions... The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States and to exercise supervisory powers over lower federal courts. If we took every case in which an interesting legal question is raised or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed on the Court." (Vinson, "Work of the Federal Courts". Address to the American Bar Association September 7, 1949, 69 Supreme Court Reporter V).

CONCLUSION

FOR THE REASONS STATED, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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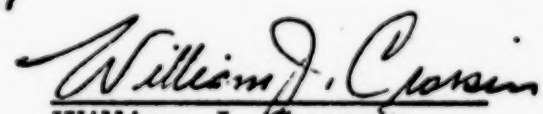
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on three copies of this Brief of Intervenor in Opposition were mailed, postage prepaid, to the attorney for Petitioner, Richard Dorn, 380 Madison Avenue, New York, New York 10017, and to the attorney for Respondent, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.

Dated: November 9, 1977



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